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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OCT 16 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the matter of

Policies and Rules Concerning
Children's Television Programming

Revision of Programming Policies
for Television Broadcast Stations

MM Docket 93-48

DOCKET FILE COPY ORIGINAL

TO: The Commission

COMMENTS OF
TRIBUNE BROADCASTING COMPANY

TRIBUNE BROADCASTING COMPANY

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October 16, 1995

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TABLE OF CONTENTS

	<u>Page</u>
SUMMARY	i
INTRODUCTION	1
I. CONGRESS WANTED TO STIMULATE THE BROADCAST OF PROGRAMMING SERVING CHILDREN'S EDUCATIONAL AND INFORMATIONAL NEEDS. IT DID NOT WANT THE COMMISSION TO ENGAGE IN QUANTITATIVE REGULATION . .	3
A. Congress Did Not Want Educational/Informational Programming Quotas to be Imposed.	3
B. The Commission Must Conduct a Monitoring Study Since It Lacks Reliable Data on the Amount of Educational/Informational Programming Being Broadcast.	5
C. Congress Intended an Increase, But Not an Ever- Increasing Amount, of Educational/Informational Programming for Children.	8
II. CLARIFYING OR CHANGING EXISTING DEFINITIONS AND RULES IS LARGELY UNNECESSARY.	9
A. The General Definition Should Be Retained. . .	9
B. Defining "Core" Programming	11
1. "Significant" Educational Purpose.	12
2. Educational Objective and Target Audience. .	14
3. Time of Day.	15
4. "Regularly Scheduled."	16
5. "Substantial Length."	18
6. Icons and Program Guides.	20
7. Reruns and Repeats	22
C. Public File and Related Requirements	23
CONCLUSION	26

SUMMARY

The Commission must interpret and apply the Children's Television Act of 1990 as Congress wrote it. Congress wisely chose to avoid fixed numerical programming requirements, and expressed a preference for flexible, creative efforts.

Congress intended to increase the amount of educational and informational children's programming over the amount available when the Act was adopted. The Commission admits it does not have reliable data on how much educational and informational programming actually is being broadcast for young people today. Before the Commission can regulate intelligently in this field, it must conduct a monitoring study — comparing programming levels in 1990 with levels over the next two or three years — to determine whether its efforts have succeeded.

The Commission should make clear that "core" programming, specifically designed to meet children's educational and informational needs, may be entertaining as long as it has education or information as a significant purpose. The Commission also should retain its existing, inclusive definition of programming that meets children's educational and informational needs. The rest of the Commission's proposals — to redefine "core" programming and to increase the burden of compiling children's programming reports — are unnecessary and would chill the production and scheduling of thoughtful children's programming that children actually will watch.

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**COMMENTS OF
TRIBUNE BROADCASTING COMPANY**

Introduction

Tribune Broadcasting Company submits these comments in response to the Commission's Notice of Proposed Rule Making in the above-captioned matter, 10 FCC Rcd 6308 (1995) ("Notice"). Tribune filed comments in this Docket in response to the Commission's original Notice of Inquiry ("1993 Comments," filed May 7, 1993). They are incorporated by reference here.

Tribune and its eight television stations* have a major stake in the outcome of this proceeding. Each station is known in its local market as a leading source of children's entertainment programming. Each station takes

* WPIX, New York; KTLA, Los Angeles; WGN-TV, Chicago; WPHL-TV, Philadelphia; WLVI-TV, Cambridge/Boston; WGNX, Atlanta; KWGN-TV, Denver; WGNO, New Orleans. Tribune Entertainment Company, a Tribune subsidiary, has produced and distributed children's programs, including a program specifically designed to meet Children's Television Act requirements.

seriously its obligations to provide educational and informational programming for young people in its audience.

Since enactment of the Children's Television Act of 1990 (the "Act")*, Tribune stations have increased substantially the amount of educational and informational programming designed for young viewers that they air. Informal observation of the marketplace suggests that nearly all television broadcasters have done likewise.

Tribune shares the Commission's view that Congress intended to increase the amount of television programming that serves children's educational and informational needs. Notice at 6309. The Act has achieved this objective. Tribune disagrees that the Commission can rationally conclude at this point that broadcasters have not done enough, and from that premise require more educational and informational programming to be aired. First, the Commission has not measured the increase in educational/informational programming that already has taken place. Without such a benchmark and current information, the Commission cannot make an informed decision. The Commission must first gather and review the data, and then make an assessment.

The Commission lacks statutory authority to issue a rule mandating a minimum amount of educational and informational programming for children. Such quotas would

* 47 U.S.C. §§ 303a, 303b.

be unlawful, probably unconstitutional, and would not encourage the development of thoughtful children's programming.

The Commission makes several suggestions designed to clarify its rules (Notice at 6311) so that broadcasters will understand what is and is not considered programming that serves the educational and informational needs of children. Tribune doubts that such detailed regulation is necessary, and opposes the Commission's proposals to the extent they will function as preconditions to a broadcaster's receiving "credit" under the Act. Tribune will respond to the Commission's proposals below.

I. CONGRESS WANTED TO STIMULATE THE BROADCAST OF PROGRAMMING SERVING CHILDREN'S EDUCATIONAL AND INFORMATIONAL NEEDS. IT DID NOT WANT THE COMMISSION TO ENGAGE IN QUANTITATIVE REGULATION.

A. Congress Did Not Want Educational/Informational Programming Quotas to be Imposed.

The two principal sections of the Children's Television Act are quite different. The first, regulating commercial time in programs designed for young children*, is very specific. It contains fixed numerical limits. The second, dealing with educational and informational programming for children**, is much more general. It contains no numerical requirements. Rather, it simply

* 47 U.S.C. § 303a(b).

** 47 U.S.C. § 303b.

requires the Commission to assess at license renewal time the extent to which a station has served children's educational and informational needs "through the licensee's overall programming," including programming specifically designed to meet children's educational and informational needs. Clearly, the notion of fixed, quantitative requirements for educational and informational programming — a notion that Congress considered and rejected — is foreign to the Children's Television Act.

The Commission recognized this in the rulemaking required by the Act: "The Act imposes no quantitative standards and the legislative history suggests that Congress meant that no minimum amount criterion be imposed." Report & Order, 6 FCC Rcd 2111, 2115 (1991). Upon reconsideration, the Commission restated its conclusion in stronger terms:

The *April 12 Order* stated that licensees must air some educational and informational programming "specifically designed" for children ages 16 and under in order to satisfy renewal review. We declined to adopt minimum quantitative criteria, finding that the Act imposes no such quantitative standards, and the legislative history indicates that none should be imposed. NABB urges, as it did in its comments, that the Commission should adopt quantitative processing guidelines. We agree with NAB, however, that **such guidelines, even if they do not automatically result in sanctions if violated, conflict with Congressional intent not to establish minimum criteria that would limit broadcasters' programming discretion.**

Memorandum Opinion & Order, 6 FCC Rcd 5093, 5100 (1991)
(emphasis supplied; footnotes omitted).

Two years later, in opening this Docket, the

Commission again had occasion to discern Congress' "express preference for avoiding quantitative standards and for relying on licensees' judgment in meeting children's programming needs." Notice of Inquiry, 8 FCC Rcd 1841, 1842 (1993).

Tribune submits that it would be unlawful, arbitrary and capricious for the Commission to adopt a minimum children's programming quota (or a "quantitative programming standard," in the language of the Notice, id. at 6336), given the Commission's prior reading of the statutory language and the legislative history. It is too late to suggest, as is done in the Notice, that the Commission is free to adopt a mandatory minimum programming requirement since Congress did not forbid the Commission to do so. Id. The Commission accurately read the unambiguous statute and the clear legislative history in 1991.*

B. The Commission Must Conduct a Monitoring Study Since It Lacks Reliable Data on the Amount of Educational/Informational Programming Being Broadcast.

Although Tribune, in its 1993 Comments, advocated adoption of a policy statement containing a "safe harbor" level of children's educational and informational programming, Tribune does not believe it is appropriate for the Commission to take such action at this time. The

* Tribune submits that programming quotas would also raise a very serious First Amendment issue. The Commission would be well advised to follow Congress' lead in steering clear of such a conflict.

Commission confesses in the Notice that it cannot accurately gauge how much educational and informational programming is available to the children's television audience, because the studies submitted to date have been inconsistent and unreliable:

After careful review ... we find that this evidence is insufficient to support a conclusion as to whether or not the educational and informational needs of children are being met, including whether the [Act] and our existing regulations have precipitated a significant increase in the amount of children's educational and informational programming carried by commercial broadcasters. In particular, none of the studies submitted enables us to determine accurately what amount of programming specifically designed to educate and inform children is currently being aired by commercial stations.

Id., 6318; see also id., 6335.

Given the Commission's avowedly inadequate data on the amount of educational and informational programming presented by television broadcasters, Tribune submits it would be premature and arbitrary to impose regulatory mandates, which presume a shortage of such programming.* The Commission must undertake a monitoring study to obtain reliable data on which to make its First Amendment-sensitive judgments. Following such a study, the Commission can best judge at what level, if any, regulatory guideposts should be

* Commissioner Barrett, in his separate statement, points out the *non sequitur* in the Notice's reasoning: despite the acknowledgment that educational and informational programming for children has increased, "and without the benefit of conclusive data to quantify that increase, the Commission has determined that a shortage still exists today." Notice at 6364.

set, and whether incentives or other measures could be initiated to spur additional programming that will educate, inform and attract an audience. An appropriate "safe harbor" ought to be a component of any such regulatory proposal. In any event, the regulatory initiative should be subject to public notice and comment in light of the factual record developed.

Tribune submits that the study should compare stations' present levels of educational and informational programming with the amounts broadcast at the time the Act was adopted in 1990.* The study should measure both programming specifically designed to meet children's educational and informational needs, and other programming that serves these needs without being targeted to children alone.

The Commission should track stations' programming over two or three years, and compare current practice with pre-Act levels, to establish a clear trend. Only then would the Commission be in a position to make a reasoned decision about the state of the children's programming marketplace, and the nature and extent of the regulatory response, if any, that is warranted.

* Tribune stations' programming specifically designed to meet children's educational and informational needs has more than tripled since 1990. Tribune suspects other broadcasters would show increases of similar magnitude.

C. Congress Intended an Increase, But Not an Ever-Increasing Amount, of Educational/Informational Programming for Children.

Despite the Commission's observation in the Notice about society's undeniable and substantial interest in the welfare of its youth, id. at 6341-42, Congress has not given the FCC a roving commission to act as advocate for young television viewers. It is the Commission's duty to interpret and apply the Children's Television Act as Congress intended.

Congress made a finding, in adopting the Act, that stations should present "programming that serves the special needs of children" as part of their broader obligation to serve the public interest.* But the Act did not, as noted above, specify quantitative programming requirements. Nor did Congress state or imply that children's educational and informational programming must show a continuing upward spiral over time.** Congress intended there to be a "measurable increase" in educational and informational programming, Notice at 6311, over the level that existed at the time the legislation was adopted. Tribune does not agree that the Commission will have found a market failure

* Pub. L. 101-437, 104 Stat. 996, Title I, § 101(2).

** There can be no dispute that a significant increase should be expected in the first years after the Act's programming requirements take effect, as broadcasters and program suppliers create local, network and syndicated programming to satisfy the demand created by the legislation.

if it does not detect a "significant increase in programming specifically designed to serve children's educational and informational needs" over the study's measurement period. Id., 6337. Tribune submits that if the study demonstrates a significant current increase over 1990 levels, the Commission should determine that the primary legislative objective has been accomplished.

Tribune considers it inappropriate for the Commission to say it is "disappointed" that the amount of educational/informational programming "has not increased as much as anticipated" when the current rules were adopted in 1991. Notice at 6331-32. The basis for the Commission's disappointment is somewhat unclear, since the Notice admits that the Commission does not know how much educational and informational programming is being presented. If a significant increase over pre-Act levels has occurred, then the statutory goals have been met, and the Commission should consider its efforts a success. Even if the Commission considered further mandatory increases appropriate and constitutionally permissible, it could not require them without new authority from Congress.

II. CLARIFYING OR CHANGING EXISTING DEFINITIONS AND RULES IS LARGELY UNNECESSARY.

A. The General Definition Should Be Retained.

The Notice acknowledges that the Commission deliberately adopted an expansive definition for programming

that meets the statutory requirement of serving children's educational and informational needs: "programming that furthers the positive development of children 16 years of age and under in any respect, including the child's intellectual/cognitive or emotional/social needs." Note to 47 C.F.R. § 73.671. This inclusive definition was chosen out of respect for the First Amendment, and was motivated by a desire to encourage flexible and creative approaches to meeting the Act's mandates. Notice at 6323; Report & Order at 6114.

Tribune urges the Commission to retain this definition. The spectrum of programming that can educate and inform children is as expansive as human creativity. A station should be entitled to take "credit" for any program it believes in good faith meets this definition.

However, the Act contemplates the telecast of two types of programming to meet children's educational and informational needs: "overall" programming of all sorts, and programming "specifically designed" to meet such needs.

As stated in our 1993 Comments, Tribune believes the Commission must not accord short shrift to programming designed for general audiences that also educates or informs children. This sort of programming is likely to be aired at the most popular times, to attract the largest audiences, to reflect the highest production values, and to be well promoted. Tribune disagrees with the suggestion in the

Notice that "family" programming of this sort "serve[s] children only marginally." Id., 6327. A great program is no less great for inspiring adults at the same time it teaches a lesson to teenagers or younger children.

B. Defining "Core" Programming.

The Notice concludes that the absence of a definition of "core" programming — programming specifically designed to meet the educational and informational needs of children — has misled stations and resulted in misplaced references to general-audience programming on renewal applications. Id., 6327. The Notice proposes to scrap the current, expansive definition "because licensees appear to be airing sufficient amounts of such programming," and would substitute a highly restrictive, multi-part definition of "core" programming. Id.

Tribune submits that the Commission is proposing the wrong remedy for the problem it perceives. First, given the statutory reference to "overall" programming, and the broad definition derived from the legislative history, the Commission has no authority to ignore or disallow credit under the Act for general-audience programming when it reviews license renewal applications. Second, if the Commission would like licensees to identify general-audience and "core" programming separately on license renewal applications, it should make the instructions on the forms clearer, not abolish the definition that properly has been

embodied in the Rules.

Because the Act distinguishes between "overall" and "specifically designed" programming, Tribune believes it would be useful for the Commission to define "core" programming. Tribune agrees that the definition should be as simple as possible. However, the Commission has done quite the opposite. Rather than propose an easily understood description of these programs, the Notice concatenates a series of new regulatory measures ostensibly designed to increase the availability of information to parents while reducing the programming that would qualify, and calls it a definition. Id., 6327-31.

The definition proposed in the Notice is outrageously restrictive, given the underlying congressional directives to encourage flexibility and creativity. Tribune believes the definition should be descriptive and not prescriptive. The Commission should not add regulations under the guise of a clearer definition. New regulations, independent of the definition of "core" programming, must be independently justifiable and reflective of legislative intent. Tribune comments on these proposals below.

1. "Significant" Educational Purpose.

Tribune agrees with the Commission's proposal that a program claimed to be specifically designed to meet children's educational and informational needs should have education as a "significant purpose." Notice at 6328.

However, either educating or informing should qualify as the "significant purpose" of a "core" program.* The Commission should state that as long as a program has a significant (as opposed to minimal) educational or informational purpose, entertainment value will not disqualify it as "core" programming.

Licensees should be entitled to rely on representations from program suppliers — program producers and networks, for example — in determining whether a program has a significant educational or informational purpose. The Commission should defer to a licensee's good-faith determination in this regard.**

Tribune submits that this qualification should be the only new element of the definition of "core" programming. "Core" programming should be defined as programming specifically designed to meet the educational and informational needs of children 16 and under. Educating or informing the children's audience must be a significant purpose of a "core" program.

* Children's news programs, for example, do not educate in the pedagogical sense. They do inform, however.

** The licensee's good-faith programming judgment should be respected in the same way the Commission defers to a licensee's judgment about whether a news interview is "bona fide" for purposes of Section 315 of the Communications Act, or whether its public affairs programs are responsive to important community issues.

2. Educational Objective and Target Audience.

The second element actually embodies two new proposed regulations. It would require licensees to spell out (a) the educational objective and (b) the target age group, of a "core" program in the children's programming reports maintained in their public inspection files. Notice at 6328.

As to listing a program's educational objective, Tribune is neither strongly opposed nor strongly supportive. Since a licensee must be satisfied that education or information is a "significant" purpose of a program, it presents no substantial hardship to specify what that purpose is. Once again, however, the Commission must permit licensees to rely in good faith on statements of purpose provided by program suppliers. Moreover, the Commission should make clear that it expects a general statement of purpose, readily understandable to broadcasters and parents, rather than the sort of analysis a Ph.D. in education or child development might provide. Examples provided by the Commission would be helpful.

Nevertheless, Tribune doubts that this added regulatory burden would improve the quality of children's programming or materially benefit the public. It would, however, lengthen the already voluminous programming exhibits to license renewal applications. Tribune doubts that stations will focus on the educational purpose of a

program any more or less if the information has to be included in a quarterly or annual report. Obviously, educational purpose is a key factor considered whenever a "core" program is selected or produced. And, as noted below, the public will derive little benefit from including this information in a station's public inspection file, given the scarce attention these public files have received.

On the other hand, requiring stations to specify a program's target audience appears, in educational parlance, to be "busywork." The Commission has specifically said that broadcasters need not target or identify any or all children's age groups in their program offerings. Report & Order, *supra*, 6 FCC Rcd at 2114. The benefit to parents or children of including this information in a station file — at the end of a calendar year or calendar quarter — is tenuous at best. The burden of requiring this exercise — if only to enable the Commission to compile and evaluate the data — would outweigh the benefit, because it is doubtful the Commission could lawfully require targeting of specific children's subgroups in the first instance, consistent with the First Amendment. Tribune opposes this proposal.*

3. Time of Day.

The Notice proposes to allow credit for "core" programs only if they are broadcast between 6 a.m. and 11

* The Commission rejected this very proposal in 1991. Memorandum Opinion & Order, *supra*, 6 FCC Rcd at 5100.

p.m. Id., 6329. While Tribune continues to believe that a station should receive credit as long as there is a more than *de minimis* number of children in the audience (see 1993 Comments at 9-10, Exhibit A), the 6 a.m. cutoff appears to be reasonable.

In all Tribune markets, there is a sizeable children's audience between 6 and 7 a.m. Tribune stations do not "cluster" their educational and informational programs during the 6-7 a.m. hour, and Tribune is not aware of abuses in its own or other markets that would justify limiting the number of programs that can be shown during that hour, when many children are awake and in front of the television set.* Stations construct their schedules in a manner best designed to attract an audience. To the extent regulatory constraints are applied, stations will have an even more difficult time sustaining "core" programming.

4. "Regularly Scheduled."

The Commission next proposes that only programming that is "regularly scheduled" will qualify as "core" programming for license-renewal purposes. The rationale is that only regularly scheduled programming can be easily found by parents and children.

Tribune believes adoption of such a definition would be unwise as a matter of policy, and well beyond the

* Tribune stations have not aired "core" children's programs before 6 a.m.

scope of Commission authority, given the Act's legislative history.

First, while the Commission may wish to facilitate information flow and to maximize viewing of educational and informational programs, it is nothing short of outrageous to suggest that a program that is not regularly scheduled, or not listed in program guide compiled by a newspaper, should be treated as if it had never aired, and as if no one had watched it. Such a policy would represent the height of regulatory form over substance.

Second, special programs often draw audiences because they are special. They often receive substantial promotional support — both on-air and by other means, such as direct mailings to schools. They represent a way for small and large stations to exhibit their local commitment to children's programming without having to invest in the production facilities and personnel needed to produce a daily or weekly series. The Commission could propose no surer way to deter the broadcast of special educational programs for children — and locally-produced children's programs generally — than to eliminate credit for specials.

Third, requiring that programs be regularly scheduled to qualify for credit would eliminate public service announcements, vignettes, and limited-run series such as "Know Your Heritage," a series of four weekly programs commemorating Black History Month that WGN-TV,

Chicago airs each year. Considering that the Commission's original Report & Order, based on its reading of the legislative history, did not require that stations air any regularly-scheduled children's programs, 6 FCC Rcd at 2125 n.81, a requirement that only regularly-scheduled programs qualify for credit would be capricious. Tribune opposes this proposal in its entirety.

5. "Substantial Length."

The Notice next proposes that only program-length offerings — "generally understood to be at least one-half hour long" — should qualify as "core" programming. Id., 6330. This proposal is explained by the fact that shorter-length programs often are not listed in printed program guides.

Tribune submits that this proposal, like others, would betray congressional intent to give broadcasters flexibility and the opportunity to be creative and competitive. Like others, it also would be bad policy.

Short-segment material — variously known as vignettes, wraparounds and interstitials — can provide a valuable supplement to program-length offerings. Because of their abbreviated length, they can be sandwiched between highly-rated programs attractive to children and can reach audiences far larger than full-length "core" programs listed in program guides. They are tailored in length to children's short attention spans and channel-switching

impulses. They can be repeated to maximize exposure, without disrupting program schedules. They can be locally produced without great expense, while enabling a station to show its commitment to young viewers. The Commission's proposal to ignore all short-form programming is all the more inexplicable because all of these benefits were acknowledged by the Commission when it first issued rules under the Act. Report & Order, *supra*, 6 FCC Rcd at 2115, Memorandum Opinion & Order, *supra*, 6 FCC Rcd at 5100.

Examples of valuable programming that would go unrecognized, and perhaps unproduced, if the "substantial length" proposal were adopted, include career-oriented interstitial presentations that The WB Television Network is including in its children's programming, "Clown About Town" segments on local history and culture in WGN-TV's "Bozo" show, a two-minute "Kid Time News" newscast which airs seven days a week at 6:58 a.m. and 4:28 p.m. on WPHL-TV, Philadelphia; kids' newsbreaks and Kids' Club vignettes on WLVI-TV, Cambridge/Boston; five-minute educational segments on KWGN-TV, Denver's "Blinky's Fun Club," and locally-produced public service announcements for children. These short-segment programs represent an education or information break between surrounding entertainment shows. They have proven popular and effective. Depriving short-form programming of credit under the Act would effectively reduce localism in children's programming. Stations would be forced to rely more and more on daily or weekly syndicated

or network programs to satisfy the Act's requirements.

No station can obtain a license renewal on the strength of short-form programming alone; some long-form programming is required. Memorandum Opinion & Order, *supra*, 6 FCC Rcd at 5100-01. Accordingly, the Commission need not limit the definition of "core" programming to long-form programs alone. All programming specifically designed to meet children's educational and informational needs should receive "credit" under the Act. The "substantial length" requirement should be rejected.*

6. Icons and Program Guides.

The final element of the proposed definition of "core" programming also encompasses two separate regulatory requirements. First, stations would be required to identify "core" programs on-screen at the time they air. Second, listings of "core" programs would have to be sent in to local program guides. Notice, 6331.

Tribune believes the on-screen identification requirement would be counterproductive. One reason that ratings for educational programs tend to be low is that children, like adults, generally prefer to be entertained when they watch television. Giving children an on-screen identifier of educational programming would, more often than

* The only place for a separate evaluation of program-length offerings might be in a "safe harbor" policy. However, such a policy should still recognize short-form programming as meeting the Act's requirements.

not, enable children to evade programming they might learn from, rather than help them find it. It is Tribune's experience that children select their own viewing much more often than they are guided by parents. Children find programs that pique their curiosity and interest, and tune in again. On-screen icons will not significantly increase viewing of shows that will not attract and hold young viewers in the first instance. And they may make it easier for children to avoid these programs. Tribune opposes this proposal.

The proposed program-guide requirement is also unlikely to yield tangible benefits. First, the Commission has no jurisdiction over newspapers. Even if every television station in America dutifully sent a list of "core" programs to its local newspapers and TV Guide, there is no guarantee they would find their way into print. There is every reason to believe newspapers, which generally do not print stations' viewer discretion advisories for movies and other programs depicting violence, would simply reject the listings or suggest that stations buy advertising space to promote their educational and informational programs. The exercise, then, would be fruitless.

Second, to the dismay of newspaper publishers nationwide, most children do not read newspapers, let alone newspapers' television listings. A majority of American families do not subscribe to newspapers or TV Guide. Thus,

even if these publications listed programs, most children (and their parents) would not have access to the listings.

Third, those newspapers who do list educational children's programs tend to do so selectively. More often than not, they select nationally televised network or cable programs, rather than local or syndicated shows. (See Exhibit A, containing listings from the New York Daily News, Chicago Tribune, TV Guide and Philadelphia Inquirer.) It is unlikely they would voluntarily devote the space to publishing a comprehensive daily or weekly listing of all educational and informational programs for children.

Every station will try to promote its own programs so as to attract the largest possible audience. Tribune stations use techniques from traditional promotional announcements to mentions by "Kids Club" hosts to an Internet home page to a viewer newsletter as ways to reach out to viewers and attract them to children's programming. We urge the Commission to allow broadcasters to use their natural competitive and creative instincts to attract and retain young viewers. Subjecting stations to the regulatory regimens proposed in the Notice are likely to dull their creative impulses and generate little or no new viewing.

7. Reruns and Repeats.

In its discussion of possible processing guidelines or safe harbor mechanisms, the Notice ominously inquires whether any credit should be accorded to repeats of